

**REDACTED DECISION – DOCKET NOS. 11-237 C, 11-238 CU**

**By: A. M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON MAY 30, 2012  
DECISION ISSUED ON JANUARY 17, 2013**

**SYNOPSIS**

**TAXATION -- PROCEDURE AND ADMINISTRATION** -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

**TAXATION -- PROCEDURE AND ADMINISTRATION** -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- “(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the Tax Commissioner . . . .” W. Va. Code Ann. § 11-15-4 (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- “Every person doing business in the State of West Virginia...shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and service tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

**TAXATION -- CONSUMERS SALES AND SERVICE TAX** -- If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW** -- The Petitioner failed to account for and remit to the Tax Commissioner all of the consumers sales and service taxes collected from her customers.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW** -- The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner’s liability for consumers sales and service tax purposes. Nor were they adequate to accurately reflect the Petitioner’s business operations.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW** -- The Tax Commissioner used the best information available to ascertain how many customers the restaurant served per day.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW** -- The Tax Commissioner did not use the best information available to ascertain how much each customer spent and how much food was in each take out bag.

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

**WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF MET** -- The Petitioner in this matter has met her burden of showing that the assessment against her was erroneous.

## **FINAL DECISION**

On May 27, 2011, the Auditing Division of the West Virginia State Tax Commissioner’s Office (the Tax Department or the Respondent) issued two Audit Notices of Assessments, against the Petitioner.<sup>1</sup> These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.*, of the West Virginia Code. The first assessment was for consumers sales and service tax for the period of

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<sup>1</sup> The assessments were issued in the name of Petitioner’s business name, with no mention on the face of the assessments that the business was a sole proprietorship.

January 1, 2008, through June 30, 2008, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_. The second assessment was for combined sales and use tax for the period July 1, 2008 through March 31, 2011, for tax in the amount of \$\_\_\_\_, interest in the amount of \$\_\_\_\_ and additions to tax in the amount of \$\_\_\_\_, for a total assessed liability of \$\_\_\_\_. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, on July 11, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, two petitions for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petitions was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

### **FINDINGS OF FACT**

1. The Petitioner owns and operates a restaurant in a West Virginia city.
2. In October of 2010, auditors from the West Virginia State Tax Department traveled to the offices of the Petitioner's accountant for the purpose of conducting an audit of the Petitioner's business.
3. During this October 2010 visit, the auditors were provided with some financial records, such as bank statements, purchase invoices, tax returns and cash register tapes from 2008.
4. At the conclusion of their visit, the auditors scheduled a follow up visit and asked that additional records be provided during the next visit. The auditors, specifically, wanted cash register tapes from November 2010. The reason for this specific request was that the auditors planned on conducting a surveillance of the Petitioner's business in November and they wanted

to see if the Petitioner would be able to provide business records that would match the surveillance.

5. The auditors returned to the accountant's office in December of 2010. During this visit, they were not provided with additional cash register tapes. The auditors scheduled a third visit with the accountant, and again reiterated their desire to see cash register tapes from November of 2010.

6. The auditors visited the accountant in May of 2011, and again were not provided with the requested cash register tapes.

7. Meanwhile, the Tax Commissioner undertook surveillance of the Petitioner's establishment on two days in November 2010. On both days, two Tax Department employees sat outside the restaurant from opening until approximately 9 or 10 p.m. During that time they noted the number of people that entered, the time of entry and exit, the number of takeout bags that left in customer's hands and the number of takeout bags that left the establishment with a delivery person.

8. On each day of surveillance, one of the observing employees would enter and purchase a take-out order. At the time of these take-out purchases, the employee would observe that the person manning the register was actually using it as a cash drawer; that is, they were not "ringing up" the take-out order that the employee had just paid for. Instead, the drawer was just kept open all the time and used to make change.

9. Once the May 2011 visit to the Petitioner's accountant was completed, the auditors were of the opinion that the books and records of the Petitioner were inadequate to accurately reflect her business operations.

10. As a result, they relied upon the surveillance to ascertain the average number of customers the restaurant served each day, that number being \_\_\_\_\_. They then took that number and multiplied it by the average check amount for each customer. They arrived at the average check amount by using the 2008 cash register tapes that they had been provided. The average check amount that the auditors arrived at was \$\_\_\_\_\_. Then the auditors multiplied the information that they had gathered to arrive at a calculated amount of daily, monthly and yearly sales. Finally, the auditors took these extrapolated sales amounts and calculated the Petitioner's unremitted sales taxes and issued the assessments in the amounts listed above.

### **DISCUSSION**

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the Tax Commissioner in accordance with the provisions of this article.” W. Va. Code Ann. § 11-15-3(a) (West 2010). A vendor is defined as “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” W. Va. Code Ann. § 11-15-2(z) (West 2010).

Likewise, the Code provides that, “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010). Section 4 also lays out the record keeping requirements for vendors tasked with collecting sales tax.

(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3)

The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . .

Id.

Section 14a of Title 110, Series 15 of the West Virginia Code of State Rules also lays out the record keeping requirements of business people in the state, “Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and service tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993). Further, “if records are inadequate to accurately reflect the business operations of the taxpayer the tax auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

This Tribunal rules that the Petitioner failed to remit to the State all of the sales tax collected from her customers. Therefore, there are two questions to be answered in this matter. First, did the Petitioner keep complete and accurate enough records so that that the Tax Commissioner could adequately determine her business operations and liability for consumers sales and service tax purposes? Second, if the Petitioner’s records are inadequate, did the Tax Commissioner use the best information available to ascertain her correct sales tax liability?

The answer to the first question is an easy no. The auditor who testified, stated that after three attempts to audit the Petitioner’s books, she still was not provided with the type of documents, most importantly, cash register tapes, that would provide an accurate picture of the Petitioner’s business operations. The Petitioner claims that the November 2010 cash register tapes were provided during the audit. The Petitioner offers no explanation for why the auditors would ignore these documents. For her part, the auditor claims that to the best of her

recollection, she was not provided with November 2010 cash register tapes. No matter what actually transpired, two things are certain. First, the Petitioner had many months between filing her petition with the Office of Tax Appeals and the evidentiary hearing. During that time, any documents that **accurately** reflect the Petitioner's business could have been introduced. Second, the purported cash register tape that was introduced at the evidentiary hearing hurts the Petitioner's case more than it helps.<sup>2</sup> That tape is from one of the days during which the Tax Commissioner conducted surveillance. According to the testimony, one of the observers entered the restaurant and purchased lunch and was the twenty second customer of the day. However, on the register tape introduced, her lunch purchase was the tenth transaction of the day. By the introduction of this tape, the Petitioner assisted the Tax Commissioner in proving that they were not ringing up all transactions.

The next question is, did the Tax Commissioner use the best information available to arrive at the Petitioner's daily, monthly and annual sales? The Tax Commissioner used two data points, the number of customers per day, and the average amount each customer spent. The first number, the customer counts, is straightforward. Here, the Tax Department employees sat outside and counted each customer, in the manner described above. During the evidentiary hearing the Petitioner made a halfhearted attempt to poke holes in this customer count. However, this attempt was not persuasive. For example, the Petitioner took exception with certain customers who, according to the observers' logs, came in and left just a few minutes later with food. The Petitioner argues that the few minutes noted on the observers' reports would not have allowed enough time to prepare the food for these customers. The observer's testified that

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<sup>2</sup> The record in this case includes a cash register tape marked as State's Exhibit 5. This Exhibit was introduced, but not admitted. However, because the document was introduced by the Petitioner and examined by the Respondent, it is difficult to imagine either party being prejudiced by it becoming part of the record in this matter. Additionally, this Tribunal would have reached the same conclusions without the introduction of this purported cash register tape.

these were people coming in to pick up take-out orders that had obviously been called in, hence, their brief time inside the restaurant. Additionally, it should be noted that one of the Petitioner's exhibits actually used the Tax Commissioner's customer counts as a starting off point. Finally, the Petitioner has not provided this Tribunal with better information regarding how many customers it serves each day. It is the Petitioner's failure to maintain adequate records that forced the Tax Commissioner to send observers to sit outside the restaurant for two whole days. This Tribunal finds that the Tax Commissioner did use the best information available to him to ascertain how many customers the Petitioner served in an average day.

The next data point the Tax Commissioner calculated was how much money each customer spent. The Tax Commissioner calculated this amount as \$\_\_\_\_, a figure that the Petitioner vehemently objected to. The way the Tax Commissioner arrived at this figure was by taking the Petitioner's 2008 cash register tapes and simply adding up the gross sales and dividing by the number of customers served. At the evidentiary hearing, the Tax Commissioner introduced a spread sheet containing a daily breakdown of 2008's register tapes. (State's Ex. 2). Here, the Tax Commissioner did not use the best information available because from February 25<sup>th</sup> through June 30<sup>th</sup> State's Ex. 2 contains the purported sales for the day but zeros for the customer counts. As a result, when 2008's total sales were divided by the year's total customers, the denominator is a made up number (a number that does not show how many customers were served that year) that skews the average check amount into a nonsensical number. Even one of the auditors, who testified at the evidentiary hearing, stated that she would not have used the 2008 register tapes to calculate the average check amount.

**JUDGE POLLACK:** I heard your response to Mr. A's question about why you relied on the Z tapes from 2008, but I want you to



reiterate it. It's your testimony that it was the best information available, regarding the average check?

**MS. HOCKENSMITH:** Yes, I would say that because we had a full year of cash register tapes that after we talked with legal and management, the decision was to use the best records available, which was a complete year.

**JUDGE POLLACK:** But I'm a little confused, because I thought their records were not reliable. Are you saying that 2008's records were reliable?

**MS. HOCKENSMITH:** I would say that I would not have accepted any of their records, but as we had no real way to determine an average price per transaction, that's what we were left with.

*See Transcript p. 136*

As discussed above, Ms. Hockensmith is incorrect when she characterizes 2008's records as a "complete year".

As a result, we are left with the question, what is the best information available to ascertain how much each of the customers spent at the Petitioner's restaurant? One option would be to use the Petitioner's 2008 info for every day except February 25<sup>th</sup> through June 30<sup>th</sup>. The problem with this approach is that both Ms. Hockensmith and this Tribunal are of the opinion that the Petitioner's records are suspect. This is evidenced, in part, by the fact that if one takes State's Ex. 2, and cancels out the bad data; it still shows an average customer count of \_\_\_\_ customers per day. However, the evidence the Tax Commissioner introduced at the evidentiary hearing is that he believes that the restaurant served an average of \_\_\_\_ people a day. This Tribunal believes that the best information available regarding the average check is the menu prices. Specifically, a mean lunch price and a mean dinner price, based upon the menus<sup>3</sup>, in order to arrive at an average check for both lunch and dinner.

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<sup>3</sup> A copy of the restaurant's menu was introduced at the evidentiary hearing.

The final part of our calculations involves the take-out orders, which, according to the observer's reports, make up the majority of the Petitioner's business. Interestingly, the Tax Commissioner, in perhaps a tacit admission that the calculated average check amount was way too high, cut the Petitioner a break in how he calculated take-out orders. Simply put, the testimony revealed that the observers counted each take-out bag as containing one meal, this despite the fact that the average household size in this West Virginia County is 2.4 people. *See* Index Mundi (Oct. 22, 2012) <http://www.indexmundi.com/facts/united-states/quick-facts/west-virginia/average-household-size#map> and City-Data (Oct. 29, 2012) [http://www.city-data.com/county/West\\_Virginia\\_County-WV.html](http://www.city-data.com/county/West_Virginia_County-WV.html).

In summation, we rule that the Petitioner did not keep complete and accurate records. As a result, the Tax Commissioner was correct in exercising the discretion the Legislature has afforded him to determine the best information available to calculate the Petitioner's unreported sales. The Tax Commissioner used the best information available to figure out how many customers the Petitioner served in an average day. The Tax Commissioner did not use the best information available to calculate how much each customer spent. The Tax Commissioner had better information at his disposal, namely, the restaurant's menus. Lastly, there is information readily available to show what the average household size is in this County in, West Virginia. As a result it is possible to take the average lunch check or the average dinner check and multiply that times the number of lunch and dinner customers. Lastly, due to the fact that the Petitioner cannot show how many take-out orders were in each observed bag, and due to the fact that the Tax Commissioner's observers do not have x-ray vision and finally, due to the fact that take-out orders appear to make up a majority of the Petitioner's business, a method must be established to ascertain how much food is in each take out bag. Information is readily available online that

shows that the average household size in this County in West Virginia is 2.4 people. Therefore, it is reasonable to determine that the best information available regarding all of the Petitioner's take-out orders is that they are 2.4 times the average check of each eat-in customer.<sup>4</sup>

### **CONCLUSIONS OF LAW**

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same. *See* W. Va. Code Ann. § 11-15-1 and § 11-15-3 (West 2010).

4. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code Ann. § 11-15-4 (West 2010).

5. “(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds from sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes

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<sup>4</sup> The observers' notes show the ratio of eat-in to take-out customers at the restaurant.

collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the Tax Commissioner . . . .” W. Va. Code Ann. § 11-15-4 (West 2010).

6. “To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code Ann. § 11-15-6(b) (West 2010).

7. “Every person doing business in the State of West Virginia...shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and service tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

8. If, when auditing taxpayer records, said records are, “. . . inadequate to accurately reflect the business operations of the taxpayer, the tax auditor will determine the best information available and will base the audit report on that information.” W. Va. Code R. § 110-15-14b.4 (1993).

9. The Petitioner failed to account for and remit to the Tax Commissioner all of the consumers sales and service taxes collected from her customers.

10. The records which were provided to the Tax Commissioner were not complete and accurate enough to determine the Petitioner’s liability for consumers sales and service tax purposes. Nor were they adequate to accurately reflect the Petitioner’s business operations.

11. The Tax Commissioner used the best information available to ascertain how many customers the restaurant served per day.

12. The Tax Commissioner did not use the best information available to ascertain how much each customer spent and how much food was in each take out bag.

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax

against her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

14. The Petitioner in this matter has met her burden of showing that the assessment against her was erroneous as discussed above in conclusion of law number 12.

### **FINAL DISPOSITION**

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the two assessments issued against the Petitioner on May 27, 2011 for a total liability of \$\_\_\_\_ are hereby **MODIFIED** to reflect, as of December 15, 2012, a tax due of \$\_\_\_\_, interest due of \$\_\_\_\_, and additions to tax of \$\_\_\_\_, for a **TOTAL** tax liability of \$\_\_\_\_.

Interest continues to accrue on this unpaid tax until this liability is fully paid. W. Va. Code Ann. § 11-10-17(a) 2010).

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
A. M. "Fenway" Pollack  
Chief Administrative Law Judge

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Date Entered